CITY OF OKANOGAN, WASHINGTON
STATE OF WASHINGTON

IBLA 77-458 Decided June 4, 1979

Appeal from the decision of Oregon State Office of the Bureau of Land Management declaring that title to 47.35 acres has reverted to the United States. Waterville 014968.

Affirmed.

1. Act of July 22, 1912 -- Patents of Public Lands: Generally

A decision holding that a tract of land has reverted to the United States must be affirmed where the land was patented to a municipality under authority of a special statute which expressly provided that the town shall not have the right to sell or convey any part thereof and that if the land shall not be used as public park it shall revert to the United States, and where the record shows that the municipality conveyed two small parcels to the State and has never used the remainder for park purposes in the intervening 60 years since the patent issued.

APPEARANCES: R. E. Mansfield, Esq. and David S. Edwards, Esq., Office of the City Attorney, for the City of Okanogan; John T. Hurley, Esq., Assistant Attorney General, Olympia, Washington, for the State of Washington.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On September 22, 1917, pursuant to the provisions of the Act of July 22, 1912, 37 Stat. 197, as amended by the Act of August 26, 1912, the United States in 1917 conveyed by patent 47.35 acres of land to the Town of Okanogan, Washington, for use as a park. 1/ The statute under which this was accomplished contains the following proviso:

1/ Patent No. 601319, dated September 22, 1917.

> That the said town shall not have the right to sell or convey the land herein granted, or any parts thereof, or to devote the same to any other purposes than as herein-before described, and that if the said lands shall not be used as public parks the same, or such parts thereof not so used, shall revert to the United States: . . . .

The patent was expressly made subject to the restrictions and reversionary interest prescribed in the statute. Nevertheless, an examination of the land by BLM in 1974 revealed that not only had the Town (now "City") made no use of the land whatever for public park purposes in the intervening 57 years and had no plan to do so, it had conveyed 4.5 acres of the land to the State of Washington in 1956, and another 0.1 acre in 1957. The State subsequently constructed a Federal-aid highway, U.S. 97, on the land. Moreover, in 1941 the Town had granted a right-of-way permit across the subject land to the Washington Water Power Company to install and maintain electric distribution lines, with a proviso that the company's use of the land should not be such as would interfere with the use of the land as a public park. Additional transmission line easements were granted to the Bonneville Power Administration (then an agency of this Department), which ran its lines parallel to those installed by Washington Water Power Company. The company was supplanted by the Okanogan Public Utility District, which now operates the lines.

Having discovered that the City was in apparent violation of the terms of the grant by (1) never having used the land as a public park, (2) conveying the fee estate to 4.6 acres to the State, and (3) creating easements for electric transmission lines across the land, BLM issued to the City an Order to Show Cause why title to the land should not revert to the United States.

In its response, the City declared that the Mayor of Okanogan had designated the land as "Okanogan Wildlife Park" and erected a sign to that effect and installed a picnic table. Photographs of the sign and table were submitted. These show a sign reading "City of Okanogan -- Wildlife Park -- Commune with Nature." The picnic table is sited about 3 feet directly behind the sign, and both are approximately 15 feet from the edge of the paved surface of the highway, across from which there is a cluster of private residences.

BLM subsequently reported that the land was covered with brush, indicating little or no use of the land by the public; that the sign and picnic table had apparently been installed after its 1974 compliance inspection; and that they appeared to have been placed on land owned by the State of Washington. This report also noted that the land was within the Colville Indian Reservation and requested the opinion of the Regional Solicitor as to whether the land would return to Indian reservation status in the event it was deemed to have revested in the United States.

The Regional Solicitor advised that in his opinion a reversion of the title could be asserted, and he also informed the Superintendent of the Colville Agency that the reversion of the title to the United States was in prospect, and that the tribe could request the return of this land to tribal trust status in that event. 2/

On June 9, 1977, the Oregon State Office, BLM, issued a decision holding that the violations of the statute had operated to divest the City and revest title in the United States pursuant to the reverter clause. The State and the City each filed timely notices of appeal.

The City argues that "through an accident of geography" the park site and the railroad line were located on the east side of the river, whereas the commercial and residential areas were on the west side of the river, adding:

> Thus, there was no immediate need to develop the land sold to the Town of Okanogan by the Federal Government as a park, and more importantly the small and struggling Town of Okanogan did not have adequate funds to be able to develop such a park. The Town did, however, deem it important to hold and keep the land in its natural state for future use as a park.

The City argues that it has always intended to utilize the land as a park, as evidenced by the recitation in the 1941 right-of-way permit to Washington Water Power. It insists that the conveyance to the State for a Federal-aid highway and the electric transmission line rights-of-way held by Bonneville Power and the Okanogan PUD were made in the public interest and did not affect the utility of the land for future park purposes. Further, it asserts that at the time these interests were granted the City was acting in good faith on the basis of reports by title insurance companies that fee title was reposed in the City. Moreover, it is asserted that recently there has been a population increase on the east side of the river, where, for the first time, land on that side is being devoted to nonindustrial purposes. The City says it has now annexed the area in which the park site is situated.

[1] The City's protestations of good faith and its asserted intention to devote the land to park use at some time in the future,

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2/ Although both the Colville Tribe, by its counsel, and Superintendent, Colville Agency, Bureau of Indian Affairs, have expressed an interest in this case, neither has entered an appearance. The question of what, if any, contingent interest the Tribe may have in this land is not before us, and we make no decision with respect thereto, particularly as it is alleged that the land is within the corporate limits of the City of Okanogan.

although doubtless true, do not provide a basis for reversal of the BLM decision. There are no facts seriously in dispute. In January 1974 when the BLM realty specialist conducted the first compliance inspection, he reported that not only were there no signs of any devotion of the land to park use, but that in an interview with the City's Clerk-Treasurer he was informed that there were no present or future plans for park development and that no funds had been allocated for such a purpose. This was nearly 57 years after the patent issued. The subsequent erection of the sign and installation of the picnic table (apparently on State land), may be viewed, at best, as evidence of the City's intention that the tract be used as a park. A reexamination of the site, however, disclosed that it was not being so used, and that the City had done nothing by way of development to make it suitable for such use. At the time the BLM rendered the decision from which this appeal is taken, a full 60 years had elapsed without any use of the tract which would comport with the purpose of the grant.

Nor can there be any gainsaying the fact that the City did quit-claim two small parcels of the land to the State. Although done in good faith, we have no alternative but to find that these conveyances were clearly violative of the statute and the terms of the patent.

The grantings of the transmission line rights-of-way may not have destroyed the utility of the land for park purposes, although they could hardly have enhanced it. The City's 1941 right-of-way permit to Washington Water Power Company included the proviso, noted above, to the effect that the company's use of the land not be such as would interfere with use of the land for park purposes. Here again, we find a manifestation of good faith, future intention to devote the land to park use which simply never came to fruition. However, we do not hold that there is evidence that the creation of these easements constituted, of itself, a sufficient basis to cause the title to revert because the lands were devoted to another use.

Nevertheless, three-score years of nonuse as a park and the conveyances of title to the state are sufficient to militate a conclusion that the reverter has operated.

In Clark County, Nevada, 28 IBLA 210 (1976), this Board held that land patented under the Recreation and Public Purposes Act (43 U.S.C. § 869 et seq. (1976)) would revert to the United States for nonuse. In reversing that decision, the District Court noted that the statute and regulations provided for reverter only in the event that the patentee devoted the land to some unauthorized use or attempted to transfer title of control without the prior approval of the Secretary, and held that mere nonuse was not equivalent to a devotion of the land to an unauthorized use. County of Clark v. Kleppe, No. CIV-LV-77-13 RDF, (D. Nev., Jan. 20, 1978). The instant case, however, is distinguished from County of Clark v. Kleppe by the language employed in the respective statutes under which the grants were made. Although the Recreation and Public Purposes Act, supra, provides for termination of a

lease issued under the act for nonuse by the lessee for the purpose specified (43 U.S.C. § 869-2 (1976)), there is no express provision for reversion of title to a grant under the act for mere nonuse by the grantee. By contrast, the special legislation which authorized the granting of this land to the town of Okanogan expressly prohibited the town from conveying the land or any part thereof or devoting the land to any other purpose, and stated, "if the said lands shall not be used as public parks, the same, or such parts thereof not so used, shall revert to the United States . . . ." There could hardly be a clearer articulation of what the law requires. Moreover, it must be remembered that this act was written solely to authorize and condition the grant of this particular tract to this specific appellant, and for no other purpose. The only element of the reverter not addressed by the Congress is the time factor for nonuse. As the land has never been used by appellant for park purposes, and such nonuse had continued for 60 years, we find that the BLM's holding that title had reverted was virtually obligatory.

In its appeal the State of Washington, appearing through its Attorney General, points out that it has been operating this limited-access highway for 20 years, and that the divesting of the State's title would create a "needlessly ambiguous situation" with respect to highway maintenance, the control of access, traffic control, and other matters. The State asks that the BLM decision be modified as to the 4.6 acres involved so that the effect can be stayed until the United States can grant the State an appropriate easement over the same land. Although the State asserts that it will apply for such easement without delay, the record does not indicate whether it has done so. The question of whether this Board could properly suspend the effect of BLM's decision for this purpose has been rendered moot by the long delay in disposing of this appeal. Initially, several requests for extensions of time to perfect the appeal were granted by this Board. Subsequently, internal factors have delayed consideration of the case. It has now been nearly 2 years since the State filed its notice of appeal, amply affording the State the time it requested to file its application for a right-of-way on that portion of the subject lands affected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

I concur:

Newton Frishberg
Chief Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING IN PART AND CONCURRING IN PART:

I would hold the problems inherent in this appeal may be resolved without the necessity of ruling that the land reverts to the United States.

The patent encompasses 47.35 acres, with a possibility of reverter as to land sold, conveyed or not used as a park. The City alleges "the land has been used as a public park" 1/ and "since the property was conveyed to the town of Okanogan in 1912, . . . town and City officials have maintained and protected the land for park purposes." 2/ In Phillips v. Laguna Beach Co., 190 Cal. 180, 211 P. 225 (1923), the California Supreme Court stated:

> The use was not constant. [3/] Such uses are seldom of that character, but the use was such as the public was likely to make of such a dedication. A park does not have to be laid off in paths or planted with flowers. It may be merely an open space which the public may use for any purpose it sees fit of a public nature.

211 P. at 226. See also City of Monte Vista, Colorado, 22 IBLA 107, 120 (1975) (dissent). Of the national parks administered by Interior, there are thousands of acres which have not been developed, and which many prefer be left in a natural state.

As to the portion of the Okanogan patent not occupied by the highway, a question of fact is presented by the allegations of the City. I suggest, therefore, that in any event the Department should not hold there has been a reversion for failure to use as a park without affording an opportunity for a hearing. Cf. Pence v. Kleppe, 529 F.2d 135, 141-42 (9th Cir. 1976); 5 U.S.C. §§ 551, 554 (1976).

As to the 4.6 acres conveyed for highway purposes, the Bureau has not made its ruling on the basis of any party's petition that title be deemed revested in the United States. In 1956 and 1957, at the time of the City quitclaim deeds, the Department would probably have made its own highway conveyance to the State if a request therefor had been made. 43 U.S.C. § 869-3 (1970). Instead, the United States apparently acquiesced in the procedure and entered into various arrangements for financing construction of the highway as a portion of Primary State Highway No. 10. Such highway is also a part of U.S. 97, which traverses the United States from Canada to Mexico.

1/ Answer to Order to Show Cause.

2/ Statement of Reasons on Appeal at 4.

3/ The facts adduced in Phillips showed considerable intermittent use of the property concerned, such use being without official sanction.

The City alleges the highway is 90 percent financed by the Federal Government. The land is apparently an essential part of the highway system. The State alleges unnecessary prejudice would occur from a determination of reversion, and has requested that no such determination be made until the State has been able to obtain regularization of the situation. Over 20 years have now passed since the two deeds from the City to the State, in which there has been a degree of acquiescence by the United States. Assuming that some relaxation in the strict rules regarding laches may be developing, particularly where the public interest is in no way prejudiced, I would hold under these circumstances that there is nothing to be gained by making an affirmative determination of reversion at this time. Cf. Roberts v. Morton, 549 F.2d 158, 163 (10th Cir. 1977), cert. denied sub nom. Roberts v. Andrus, 434 U.S. 834 (1977).

I concur with the main opinion in its ruling that the granting of the utility right-of-way has not caused a reversion.

Joseph W. Goss
Administrative Judge